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UNITED STATES OF AMERICA, for the use of NORTH STAR TERMINAL & STEVEDORE COMPANY EX REL d/b/a Northern Stevedoring & Handling and NORTH STAR TERMINAL & STEVEDORE COMPANY d/b/a Northern Stevedoring & Handling, on its behalf, Plaintiffs-Appellees, Cross-Appellants, and UNITED STATES OF AMERICA for the use of SHORESIDE PETROLEUM, INC. d/b/a Marathon Fuel Services, and SHORESIDE PETROLEUM INC. d/b/a Marathon Fuel Services, on its own behalf, Plaintiffs-Intervenors, and METCO, INC., Plaintiff-Intervenor, v. NUGGET CONSTRUCTION, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants-Appellants, Cross-Appellees, and ROBERT A. LAPORE; SPENCER ROCK PRODUCTS INC., Defendants, SHORESIDE PETROLEUM INC. EX REL; METRO, INC., Plaintiff-Intervenors-Appellees, SPENCER ROCK PRODUCTS, INC.; ROBERT A. LAPORE, Defendants. UNITED STATES OF AMERICA, for the use of NORTH STAR TERMINAL & STEVEDORE COMPANY EX REL d/b/a Northern Stevedoring & Handling and NORTH STAR TERMINAL & STEVEDORE COMPANY d/b/a Northern Stevedoring & Handling, on its behalf, Plaintiff, and UNITED STATES OF AMERICA for the use of SHORESIDE PETROLEUM, INC. d/b/a Marathon Fuel Services, and SHORESIDE PETROLEUM, INC. d/b/a Marathon Fuel Services, on its own behalf, Plaintiffs-Intervenors-Appellants, and METCO, INC., Plaintiff-Intervenor, v. NUGGET CONSTRUCTION, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants-Appellees, and ROBERT A. LAPORE; SPENCER ROCK PRODUCTS INC., Defendants. NORTH STAR TERMINAL & STEVEDORE CO. EX REL, Plaintiff, v. NUGGET CONSTRUCTION, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants-Appellants, SPENCER ROCK PRODUCTS INC., Defendant-Appellee, and ROBERT A. LAPORE, Defendant, v. SHORESIDE PETROLEUM INC. EX REL, d/b/a Marathon Fuel Services, Plaintiff-Intervenor-Appellee and METCO, INC., Plaintiff-Intervenor. NORTH STAR TERMINAL & STEVEDORE CO. EX REL, Plaintiff, and SHORESIDE PETROLEUM, INC. EX REL, d/b/a Marathon Fuel Services, Plaintiff-Intervenor, and METCO, INC., Plaintiff-Intervenor-Appellee, v. NUGGET CONSTRUCTION, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants-Appellants and ROBERT A. LAPORE; SPENCER ROCK PRODUCTS INC., Defendants.

No. 00-35230, No. 00-35467, No. 00-35481, No. 00-35773

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

19 Fed. Appx. 705; 2001 U.S. App. LEXIS 21547

August 7, 2001, Argued and Submitted, Anchorage, Alaska  
September 27, 2001, Filed

**NOTICE:** [\*\*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:** Appeal from the United States District Court for the District of Alaska. D.C. No. CV-98-

0009-a-HRH, D.C. No. CV-98-0009-HRH, D.C. No. CV-98-0009-HRH, D.C. No. CV-98-0009-HRH. H. Russell Holland, Chief District Judge, Presiding.

**DISPOSITION:** Cross-appeal of Shoreside, No. 00-35467, DISMISSED as moot. Judgments appealed from REVERSED, and the cases REMANDED for further proceedings.

**COUNSEL:** For NORTH STAR TERMINAL & STEVEDORE CO., EX REL, Plaintiff - Appellee (00-35230): Michael W. Sewright, Esq., BURR, PEASE & KURTZ, Anchorage, AK.

For NUGGET CONSTRUCTION INC., UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants - Appellants (00-35230, 00-35481): John Lukjanowicz, Esq., Traeger Machetanz, OLES, MORRISON & RINKER, Seattle, WA.

For NUGGET CONSTRUCTION INC., UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants - Appellants (00-35230, 00-35481, 00-35773): C. Russell Lewis, Esq., OLES MORRISON RINKER & BAKER, LLP, Anchorage, AK.

For NUGGET CONSTRUCTION INC., UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants - Appellants [\*\*2] (00-35773): Traeger Machetanz, OLES, MORRISON & RINKER, Seattle, WA.

For SHORESIDE PETROLEUM INC. EX REL, Plaintiff-intervenor - Appellee (00-35230, 00-35481): Steven J. Shamburek, Esq., LAW OFFICE OF STEVEN J. SHAMBUREK, Anchorage, AK.

For METCO, INC., Plaintiff-intervenor - Appellee (00-35230): George Kapolchok, Esq., Anchorage, AK.

For METCO, INC., Plaintiff-intervenor - Appellee (00-35230): Rebekah Holzubin, Esq., LAW OFFICES OF GEORG M. KAPOLCHOK, Anchorage, AK.

For METCO, INC., Plaintiff-intervenor - Appellee (00-35773): John White, George M. Kapolchok, Esq., LAW OFFICES OF GEORG M. KAPOLCHOK, Anchorage, AK.

For NORTH STAR TERMINAL & STEVEDORE CO., EX REL, Plaintiff (00-35467, 00-35481, 00-35773): Michael W. Sewright, Esq., BURR, PEASE & KURTZ, Anchorage, AK.

For NUGGET CONSTRUCTION INC., UNITED STATES FIDELITY & GUARANTY COMPANY, Defendants - Appellees (00-35467): John Lukjanowicz, Esq., Traeger Machetanz, OLES, MORRISON & RINKER, Seattle, WA.

For SPENCER ROCK PRODUCTS INC., Defendant - Appellee (00-35481): PAUL D. Stockler, Esq., LAW OFFICES, Anchorage, AK.

For SHORESIDE PETROLEUM INC. EX REL, Plaintiff-intervenor - Appellant (00-35467): [\*\*3] Steven J. Shamburek, Esq., LAW OFFICE OF STEVEN J. SHAMBUREK, Anchorage, AK.

For METCO, INC., Plaintiff-intervenor (00-35467, 00-35481): Rebekah Holzubin, Esq., LAW OFFICES OF GEORG M. KAPOLCHOK, Anchorage, AK.

For SHORESIDE PETROLEUM INC. EX REL, Plaintiff-intervenor (00-35773): Steven J. Shamburek, Esq., LAW OFFICE OF STEVEN J. SHAMBUREK, Anchorage, AK.

For ROBERT A. LAPORE, Defendant (00-35481, 00-35773): No Appearance.

For SPENCER ROCK PRODUCTS INC., Defendant (00-35773): Paul D. Stockler, Esq., LAW OFFICES, Anchorage, AK.

**JUDGES:** Before: SCHROEDER, T.G. NELSON, and SILVERMAN, Circuit Judges.

**OPINION:** [\*707]

#### MEMORANDUM \*

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Nugget Construction, Inc., and its Miller Act surety, (NCI), appeal the district court's grant of summary judgment in favor of claimants against NCI's Miller Act bond. We review the district court's judgment *de novo* n1 and [\*\*4] reverse.

n1 *Weiner v. San Diego Cty.*, 210 F.3d 1025, 1028 (9th Cir. 2000).

In *United States v. Aetna Casualty & Surety Co. (Conveyor Rental)*, n2 we reviewed the factors supporting a finding of subcontractor status. n3 Of the thirteen listed factors, most of the factors clearly do not support such a finding as to Spencer Rock Products (SRP). Although SRP supplied almost all the rock and its contract with NCI represented over 40% of NCI's total contract cost, these factors simply do not counterbalance the others. Most notably, SRP was not involved in any other portion of NCI's overall contract and the product sup-

plied was in no way unique or complex -- it was clearly merely material.

n2 981 F.2d 448 (9th Cir. 1992).

n3 *Id.* at 451-52.

Of the factors listed in *Conveyor Rental* tending [\*\*5] to support the status of a materialman, n4 only two facts weigh against finding such a status here. The material did not come from pre-existing inventory and the contract between SRP and NCI represented a substantial portion of NCI's total contract cost. Nonetheless, these facts are not determinative because the many other facts supporting materialman status outweigh them.

n4 *Id.* at 452.

The Support Agreement does not affect our analysis. NCI agreed to provide help to SRP so that SRP could complete the contract. In so doing, NCI may have exposed itself to direct suit by SRP's suppliers (we express no opinion on this issue because it is not before us). The agreement did not, however, change SRP's involvement in the project, nor require it to do any more than it had originally agreed to do. SRP continued to be a materialman.

The cross-appeal of Shoreside, No. 00-35467, is DISMISSED as moot. The judgments appealed from are REVERSED, and the cases are REMANDED for further proceedings.